No. 20,653

IN THE

United States Court of Appeals

For the Ninth Circuit

RICHARD C. PRICE, *Petitioner*

vs.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

On Petition for Review of an Order of the National Labor Relations Board

BRIEF FOR LABOR POLICY ASSOCIATION, INC., AS AMICUS CURIAE

KENNETH C. MCGUINESS,
STANLEY R. STRAUSS,
1750 Pennsylvania Avenue. N. W.
Washington, D. C. 20006,
Attorneys for Labor Policy Association, Inc.

Of Counsel:
VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & MCGUINESS,
1750 Pennsylvania Avenue, N. W.
Washington, D.C. 20006

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Pursuant to leave of this Court granted February 9, 1966, and with the consent of both the Petitioner and Respondent herein, Labor Policy Association, Inc., respectfully submits this brief *amicus curiae* in support of the aforesaid Petitioner, Richard C. Price.

Interest of Amicus Curiae

Labor Policy Association, Inc., herein called "LPA," is a nonprofit corporation organized and existing under the laws of the District of Columbia with headquarters in Washington, D.C. LPA was established, and is maintained, for the following purposes, as quoted from its charter:

> To make and to encourage researches and studies pertaining to government policies affecting labor and labor relations and their effects

> upon individual liberty, a free competitive market, the welfare of labor and industry, and any or all elements of the social order and economy of the United States; and labor policies and practices of labor unions and their effects; and any or all other matters affecting or affected by labor policies or practices; and, in the public interest, to publish and distribute such researches and studies and by any lawful media otherwise to engage in educational efforts to bring about a better understanding among the people of the United States, including appropriate public officials, of the causes and effects of policies and practices affecting labor.

Among the specific interests of LPA and its members are the development and evolution of national labor policies through the decisions of administrative agencies of the government.

The membership of LPA is composed of employers engaged in various manufacturing industries. Included are employers engaged in the manufacture of electrical equipment, farm machinery, machine tools, heavy industrial machinery, road building equipment, steel and steel fabricating, petroleum products, mining and smelting, chemicals, containers, basic plastics, and other products. These LPA members employ several hundred thousand employees, most of whom are represented for purposes of collective bargaining by, and are members of, labor organizations.

Statement of the Case

LPA, having read the briefs submitted to the Court, adopts the Statement of the Case, as set forth at pages

2-6 of the brief of Petitioner Richard C. Price (hereinafter sometimes referred to as Price). In connection with that statement LPA respectfully calls the attention of the Court to the following undisputed facts:

1. Price was required, as a condition of employment, to pay union membership dues during the term of the collective bargaining agreement between his employer and Intervenor, Local Union No. 4028, hereinafter sometimes referred to as the Union (Pet. Br., pp. 2-3; Bd. Br., pp. 2-3).

2. While a member of the Union, Price mistakenly filed a union shop deauthorization petition with the Board, which he withdrew upon learning of his error, and thereafter filed a decertification petition as he originally intended (Pet. Br., p. 3; Bd. Br., p. 3).

3. For these actions Price was suspended from membership in Local No. 4028 for five years, was fined $500 plus costs of hearing before Local 4028's Trial Committee, and was precluded from attending Union meetings for five years and indefinitely thereafter until the fine was paid (Pet. Br., p. 4; Bd. Br., pp. 3-4).

4. Subsequently, Local No. 4028's parent organization (which was not a party in the proceedings before the Board) withdrew the fine but left in effect the other penalties imposed on Price (Pet. Br., pp. 4-5; Bd. Br., p. 4).

Argument[1]

Few cases before the Board have involved issues more fundamental to the proper protection of the rights of employees guaranteed by the Act than does this proceeding, for the issue here is whether an individual union member is free to initiate a change in, or the removal of, his bargaining agent. This is not a complicated issue. However, an erroneous Board rationale has tended to obscure the plain meaning of the statute and the underlying Congressional intent, and has reached a result inconsistent with closely related Board decisions. This Board rationale would attach to the Act administratively legislated provisos and conditions unsupported by history or logic.

Reduced to its realities, this case will determine whether the exercise of a statutory right—the right to file a petition with the Board—is to be subordinated to the privilege of a labor organization to act as exclusive bargaining representative of a group of employees. Price, by filing a decertification petition, invoked his right to raise a question concerning representation in the bargaining unit where he was employed. Local 4028, by its fine and suspension, effectively destroyed that right, both as to Price and his fellow employees, and immunized its exclusive bargaining status from question by those most directly concerned, the members of the bargaining unit.

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[1]To conserve the time of the Court, LPA will not reiterate the arguments set forth by Petitioner in both his principal and reply briefs and, instead, adopts the arguments ably set forth therein.

Consequently, it is in the context of the practical results which will flow from the Board's decision, if it is not reversed, that LPA respectfully asks the Court to consider the arguments presented below.

I. Both the Fine and Suspension Imposed on Petitioner for Exercising His Right to File a Decertification Petition Constitute Unlawful Restraint and Coercion.

The Board acknowledges that there is coercion and restraint involved in both a fine and suspension from union membership, making no effort to distinguish between the two (Bd. Br., n. 5, pp. 5-6). This is consistent with the Board's treatment in other cases where it has unhesitatingly declared that both fines (for example, *Local 138, Operating Engineers (Charles S. Skura),* 148 NLRB 679, 682) and expulsion or suspension from union membership (for example, *Local 283, UAW, AFL-CIO (Wisconsin Motor Corporation),* 145 NLRB 1097, 1101-1102; *Cannery Workers Union of the Pacific (Van Camp Sea Food Co., Inc.),* 159 NLRB No. 47, 62 LRRM 1298) are coercive. Moreover, as shown in Petitioner's briefs (Pet. Br., pp. 24-26; Reply Br., pp. 14-16), by reason of its mere imposition the fine was coercive on Price and his fellow employees, and was an operative fact in the case even though a portion of the fine[2] was subsequently withdrawn by an organization not a party to the Board proceeding—Local 4028's parent organization. Consequently, whether on the basis of the record, the position of the Board in its brief, or

[2]If that portion of the fine consisting of Trial Board costs was withdrawn, it is not disclosed by the stipulated facts (See Pet. Reply Brief, n. 1, p. 3).

the Board's consistent treatment of both fines and suspensions as coercive, LPA submits that no distinction should be drawn by this Court between the fining and suspension of a union member for conduct of the sort that Price engaged in.

A further, and most significant, supporting reason for recognizing the coercive impact of a fine and suspension in the context of this case is that this may well be the sole opportunity for a Court of Appeals to speak on the matter. For LPA, which has carefully followed the policy of the General Counsel in issuing complaints in the so-called "union fine" area, is convinced that the General Counsel, following Board precedent, now limits such complaints to the narrow area of coercion levied against union members who file unfair labor practice charges.[3] Therefore, unless this Court specifically upholds the right of an individual employee to be protected from both fines and suspension when he files a deauthorization or decertification petition, the Board's failure to protect that right will become fixed and the right of a union member to file such petitions will effectively be destroyed.

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[3]The General Counsel has absolute authority over the issuance of unfair labor practice complaints, Section 3(d) of the Act specifically providing that the General Counsel "shall have final authority, on behalf of the Board, in respect to the investigation of charges and the issuance of complaints under Section 10 . . . ."

II. The Right of Employees to Select or Reject a Bargaining Agent Through Filing a Petition Under Section 9 of the Act Is Fundamental and May Not Be Subordinated to the Right of Employees to File an Unfair Labor Practice Charge Under Section 8.

Local 4028's coercive conduct here was directed at discouraging one of its members from filing a decertification petition with the Board. Such a petition permits employees in the bargaining unit to withdraw exclusive bargaining authority previously bestowed upon a union.

Insofar as this case is concerned, no meaningful distinction may be shown between the filing of a decertification petition and a petition filed by a member of a bargaining unit seeking to replace the existing bargaining agent with a rival labor organization. Nevertheless, the Board's reasoning would compel the same result had Price been disciplined for filing, or supporting, a typical representation petition on behalf of a rival group. Thus, Price's discipline was permissible, according to the Board, because his purpose was to attack the very existence of Local 4028 itself. But a petition to certify a rival union would have been equally effective in undermining Local 4028's existence if, in fact, that existence had been dependent upon its status as bargaining representative of the Pittsburgh-Des Moines employees.[4]

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[4]The fact that the Board would permit a union to fine or otherwise discipline members who file *any* petition under Section 9 is apparent from the distinction the Board drew in the *Van Camp* case, *supra,* between Board cases arising under Section 8 of the Act and Board cases arising under Section 9. We advert to this "distinction" below.

On the other hand, should the Board attempt to distinguish union discipline for filing a decertification petition from similar coercion for filing, or supporting, a certification petition, it would be inescapable that the right of employees to *change* bargaining agents would be regarded by the Board as superior to their right to *reject* such an agent. But such a concept is foreign to the Act in its present form and was, in fact, a principal reason for the 1947 amendments specifically guaranteeing the right of employees to refrain from union activities.

The Board was on solid ground in the *Skura* case *(Local 138, Operating Engineers (Charles S. Skura),* 148 NLRB 679), where it refused to sanction a union fine imposed on a member who had filed an unfair labor practice charge against the union. There the Board emphasized that ". . . no private organization should be permitted to prevent or regulate access to the Board" because of the overriding public interest involved. The Board's footing is lost completely, however, when it now takes the position that, in election matters, the public interest disappears and control of access to the Board is ceded to a private organization.

The basis of the Board's inconsistent approach between *Skura* on the one hand and this case on the other is, at most, superficially explained in the Board's decision herein being reviewed. In the very recent *Van Camp* case *(Cannery Workers Union of the Pacific (Van Camp Sea Food Company, Inc.),* 159 NLRB No. 47, 62 LRRM 1298), the Board, however, set out a more extensive treatment of its views, and,

in so doing, revealed the glaring inconsistencies and errors in its logic.

In the *Van Camp* case, the Board found a union in violation of Section 8(b)(1)(A) of the Act when a union member was expelled, though not fined, for filing unfair labor practice charges without exhausting the internal remedies provided by the union's constitution. The Board, relying upon *Skura* and the supporting decision of the United States Court of Appeals for the District of Columbia Circuit in *Roberts v. N.L.R.B.,* 350 F.2d 427, pointed out in *Van Camp* that the union's activity went beyond so-called "internal affairs" and into the public domain. For this reason, the union's immunity under the proviso of Section 8(b)(1)(A) was eliminated, the Board stating (62 LRRM at 1300), ". . . the proviso was never envisioned as extending to and shielding union conduct designed to frustrate the policies of an Act of Congress by obstructing the operations of the federal agency entrusted by Congress with effectuation of these policies."

The efforts of the Board in *Van Camp* to distinguish its protection against union coercion of employee conduct involving the filing of charges under Section 8, and its failure to provide such protection for the filing of petitions under Section 9, is bewildering as a matter of logic. It does, however, illuminate the Board's philosophy. Thus, the Board states that Section 8 charges relate to events which have already occurred and that they set in motion the Board's investigatory machinery which, in turn,

leads to a dismissal of the charges or a final adjudication by the Board on the basis of a record developed at a hearing. Then the Board notes that whether the charge is dismissed or proceeds to hearing, the determination is made by a public agency's "objective appraisal of fixed events." Therefore, says the Board, the Section 8 proceeding provides no occasion for influencing or persuading employees to support a particular disposition of the matter; neither can the employees' subjective views concerning the events involved nor their solidarity with fellow union members have any legitimate effect on the proceeding's outcome. Finally, the Board states, it is concerned in Section 8 cases only with ". . . the vindication of the public interest in securing obedience to the statute."

The Board's characterization of its own processing of an unfair labor practice case as "an objective appraisal of fixed events" is questionable. Certainly, the statement is not borne out by the Board's notorious practice of frequently reversing its own precedents.[5] The fact that the Act was twice revised, in

[5]In the representation case area, the current Board has repeatedly reversed existing Board precedents which tended to decrease union power or impair union interests. Such reversals invariably undercut or abrogated existing employee rights and individual interests. Thus, for example, the current Board has modified the rules regarding voting arrangements in representation cases to favor labor organizations. See *Ballentine Packing Company, Inc.,* 132 NLRB 923, overruling *Independent Linen Service Company,* 122 NLRB 1002; *Felix Half and Brother, Inc.,* 132 NLRB 1523, overruling *Waikiki Biltmore, Inc.,* 127 NLRB 82; *D. V. Displays Corp.,* 134 NLRB 568, overruling *The Zia Company,* 108 NLRB 1154. Similarly, the current Board has relaxed existing contract-bar principles so that existing contracts would more frequently bar petitions, and thus assure the continuance of the incumbent's bargaining status. See *Paragon*

1947 and in 1959, a result brought about in substantial part because of the criticism directed at the Board, also belies the Board's assertion. Moreover, it is somewhat naive, to say the least, for the agency which purports to have expertise in the field of labor-management relations and broad experience in the preparation and trial of unfair labor practice proceedings, to say that the outcome of Section 8 proceedings is not influenced by employees' subjective views or that there is no opportunity in such proceedings to persuade employees to support a particular viewpoint.

More significant, however, is the Board's emphasis in *Van Camp* on Section 8 proceedings as vindicating the public interest in securing obedience to the statute and, although acknowledging that Section 9 proceedings ". . . are no less in the public domain . . .," its anomalous statement that the latter should be treated differently because they are ". . . concerned with ascertaining the desires of employees as to union representation." Thus, with respect to Section 9 cases, the Board says (62 LRRM at 1300):

> The matter of union representation is resolved, not through any appraisal by the Board of alleged past events, but rather by the employees themselves, through their votes in a Board-conducted election.

Products Corporation, 134 NLRB 662, overruling *Keystone Coat, Apron & Towel Supply Company,* 121 NLRB 880; *Food Haulers, Inc.,* 136 NLRB 394, overruling *Pilgrim Furniture Company,* 128 NLRB 910; *William J. Burns International Detective Agency,* 134 NLRB 451, overruling *Columbia-Southern Chemical Corporation,* 110 NLRB 1189.

Rarely has any administrative agency ever so clearly exposed its belief that the agency is better qualified to determine the desires of the individuals which it is supposd to protect, than are those individuals themselves.

The Board also asserts in *Van Camp* that, because during Section 9 proceedings employees are "properly" subjected to campaigning by the employer, the unions involved, and by fellow employees, the union and its adherents can perform their legitimate function "only if they are unified." The Board adds (62 LRRM at 1301): "To require [the union and its adherents] to tolerate an active opponent within their ranks would undermine their collective action and would thereby tend to distort the results of the election." In other words, the Board seems to be saying that in order to assure that no voice be raised against the union, the union may, with Board approval, coerce employees so that no election will ever be held. It seems incredible that any administrative arm of our federal government would so blatantly stamp out the right to dissent not only by a minority but, in many instances, by the majority itself.[6]

The practical result of the Board's reasoning, as exposed by its *Van Camp* decision, is to reconstruct the entire statute. The union member's right to file

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[6]Noticeably missing from the Board's reasoning is any indication that the union proponent working within the ranks of unorganized employees destroys the unity of those employees.

an unfair labor practice charge against his union may be protected under *Skura* from fine or suspension, but his right to change bargaining agents is rendered meaningless. For once bargaining status is obtained, the union may effectively stamp out any membership revolt which seeks to undermine its status. The Board's likening of Price's conduct to that of engaging in rival union activity or openly soliciting defections from the union (Bd. Br., pp. 16, 20), and justifying Price's discipline by Local 4028, clearly illustrates the scope of the Board's thinking. Apparently, not only would the Board repeal the "right to refrain" guaranteed by Section 7, but it seemingly would also eliminate the right to dissent. It would follow that in the Board's opinion the prime goal of the Act is the union's continued bargaining status or existence.

III. The Board's Theory That the Act Protects "Union Disciplinary Action Aimed at Defending Itself From Conduct Which Seeks to Undermine Its Very Existence" Misinterprets the Statutory Language, Misconceives the Plainly Stated Intent of Congress, and Subverts the Policy of the Act.

As this Court is well aware, Section 7 of the Act states explicitly and unequivocally that employees have the "right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection. . . ." The same section makes it explicit that

employees "shall also have the right to refrain from any or all of such activities. . . ." These are the basic statutory rights of employees situated as Price is herein. To protect these rights Congress, in Section 8, placed certain restrictions on employer and union conduct. And, to provide the machinery for the exercise of employee free choice guaranteed by Section 7, a secret ballot election system was established in Section 9.

The emphasis on employee rights has been consistent since the enactment of the Wagner Act in 1935. In the landmark decision which upheld the constitutionality of that Act, *N.L.R.B. v. Jones & Laughlin Steel Corp.,* 301 U. S. 1, the Court said (301 U. S. at 32):

> Thus, in its present application, the statute goes no further than *to safeguard the right of employees* to self-organization and to select representatives of their own choosing for collective bargaining or other mutual protection without restraint or coercion by their employer. That is a fundamental right. (Emphasis supplied.)

The two major amendments to the Wagner Act, the Labor-Management Relations Act of 1947, and the Labor-Management Reporting and Disclosure Act of 1959, underscored the protection of employee rights and broadened them to include protection from activities of labor organizations. The Congressional policy was succinctly stated by Board Member Brown in his remarks to the State Bar of Texas, July 5, 1962, when he said:

> Basic to the entire statute and pervading all its provisions is the right of employees freely to select a bargaining representative.

Neither the original Wagner Act, the 1947 amendments, nor the 1959 amendments contain any language whatsoever which is directed at protecting the status of labor organizations as such. The rules and policies developed by the courts and the Board in interpreting the Act, which sometimes appear to have this goal, are nothing more than the shadows cast by the body of the rights guaranteed employees by the statute. In sum, the statutory language contains no support for the concept that a union's right of existence is guaranteed by the Act; instead, the union's existence depends entirely on the uncoerced desires of the employees who constitute its membership.

The Board, however, would take a specific restriction on union conduct set forth in Section 8 and pervert its meaning to create a union "right of existence"—something which Congress did not see fit to include in the statute. Thus, the Board, because of the proviso to Section 8(b)(1)(A), would convert that Section, which makes it an unfair labor practice for a union "to restrain or coerce employees in the exercise of the rights guaranteed in Section 7 . . .," into an implicit union "right of existence" superior to the express employee rights "to refrain" and to invoke the Act's processes in support thereof.

It is in this context that the legislative history of Section 8(b)(1)(A) and its proviso must be considered. That history has been discussed extensively

by the parties and need not be repeated here. (See Pet. Reply Brief, pp. 5-11; Bd. Br., pp. 7-15; Int. Br., pp. 5-6, 15-16.) In essence, the Board and the Intervenor argue that Congress did not intend to regulate traditional union power to discipline its members for a violation of reasonable union rules. However, as shown by Petitioner in his reply brief (pp. 5-11), such an argument is inconsistent with the Board's own approach in the *Skura* type situation, and neither accurately reflects the legislative history nor is supported thereby.

Even the Board would not stretch the Section 8(b)(1)(A) proviso to permit disciplining members for violating *unreasonable* union rules; but a reasonable rule, according to the Board, is one which is plainly necessary to preserve the very existence of the union (Bd. Br., p. 16). No doubt a rule fitting this standard is reasonable to the union. But, as already shown, it is not the union which the statute protects. Instead, it is the right of the employee to rid himself of that union which is protected.

Finally, it should be noted that the Board's ruling with respect to Price is completely at variance with the current judicial concern for the individual in his relations with the broader group of which he is a part. Such cases as *Escobedo v. Illinois,* 378 U. S. 478, and *Miranda v. Arizona,* .....U.S....., 16 L.Ed. 2d 694, 34 U. S. Law Week 4521, show clearly that group control over the individual is not to be tolerated if the price is the subordination, or obliteration, of individual rights. True, *Escobedo* and *Miranda* involve

the individual and his relations with society as a whole. But the governing principle should be the same where the strength of the individual is pitted against the power of the labor union group—especially since this involvement is not necessarily the result of voluntary choice.

Unions owe much to their image as democratic institutions, both from the standpoint of favorable legislative treatment and acceptance by members of the working force. If they deserve such status and if that status is to continue, it is unthinkable that unions should be granted the right to suppress dissent. For the Board not only to permit but, through its inconsistent and inaccurate reading of the statute as shown above, to encourage union suppression of the membership's right of dissent, is shocking indeed.

Conclusion

Today millions of employees are bound by collective-bargaining agreements which require union membership as a condition of employment. If the Board's decision in this case is permitted to stand, those employees will be vulnerable to fines or suspension if they make any effort to seek representation by another union or to work without a union. Their right to dissent will be muted. Their agents will become their masters.

In short, the Board will have abrogated its basic function and, by its own rule, will have bestowed on a private organization the privilege and power to

nullify public law. Accordingly, the Board's order dismissing the complaint against Local 4028 should be reversed.

KENNETH C. MCGUINESS,
STANLEY R. STRAUSS,
Attorneys for Labor Policy Association, Inc.

Of Counsel:
VEDDER, PRICE, KAUFMAN,
KAMMHOLZ & MCGUINESS.

Dated: July 25, 1966.

CERTIFICATE

The undersigned certifies that he has examined the provisions of Rules 18 and 19 of the Court and in his opinion the tendered brief conforms to all requirements.

KENNETH C. MCGUINESS,
Attorney for Labor Policy Association, Inc.